Switzerland

Squeeze-out Guide

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INTRODUCTION

This guide sets out an overview of the squeeze-out procedures available under Swiss law. Its content is for information purposes only. It does not include any binding legal advice and may not be understood or used as such.

MARKET SQUEEZE-OUT VERSUS OFF-MARKET SQUEEZE-OUT

SWISS LAW PROVIDES FOR TWO FORMS OF SQUEEZE-OUTS

Market Squeeze-out

According to Article 33 of the Swiss Stock Exchange Act ("SESTA")[1], the shareholder of a listed company representing more than 98% of the voting rights following a launched takeover bid may squeeze-out the remaining shareholders by claiming the cancellation of their shares against payment of the offer price or fulfilment of the exchange offer.

Off-Market Squeeze-out

Article 8 para. 2 of the Swiss Merger Act provides for a squeeze-out of minority shareholders in connection with a restructuring (so-called "squeeze-out merger")[2].

This squeeze-out procedure is available for public and private Swiss companies and may be executed with a voting majority of only 90% (please note that the calculation of this quorum is highly disputed). However, only the shareholders of the transferring company may be squeezed-out. The prevailing opinion believes that a reversed triangular merger (squeeze-out of the shareholders in the absorbing company) is not permitted under Swiss law.

COMPARISON OF THE TWO REGIMES

	Market Squeeze-out	**Off-market Squeeze-out**
Statutory source	SESTA	Swiss Merger Act
Scope of application	Applies only to public companies with registered seat in Switzerland and whose securities are at least partially listed on a Swiss stock exchange	Applies principally to all public or private companies (except for some collective investment schemes under the Swiss Collective Investment Schemes Act)

[1] Further implementing provisions are laid down in the Stock Exchange Ordinance ("SESTO") and in the Takeover Ordinance ("TOO").

[2] According to the prevailing opinion, squeeze-outs are only available for mergers and are excluded in the case of a spin-off or a reorganization/conversion of a company. Further, an off-market squeeze-out may also be carried out by way of a so-called asymmetrical demerger pursuant to Article 31 para. 2 lit. b. of the Merger Act, where the shareholders of the transferring company are allocated membership rights in certain (or all) of the companies involved in the demerger which are not proportional to their previous participations.

Threshold	▪ more than 98% of the voting rights ▪ Squeeze-out of maximum 2% of the shareholders	▪ 90% of the voting rights (please note that the calculation of this quorum is highly disputed) ▪ Squeeze-out of up to 10% of the shareholders of the transferring company
Consideration	▪ Cash or transfer of shares of a company other than the target company ▪ Consideration is equivalent to the price offered in the previous bid ▪ Court may not adjudicate on adequacy	▪ Cash or transfer of shares of a company other than the absorbing company ▪ Consideration needs to be stipulated in the merger agreement, substantiated in the merger report and its adequacy reviewed by a licensed auditor ▪ The Merger Act provides for an action that enables assessment of the consideration. The action is to be filed within two months after the resolution on the merger has been published
Legal consequences	▪ Public shareholders lose their shareholding in the target company; their shares are transferred to the offeror ▪ No change in the company structure	▪ No participation of the squeezed-out shareholders in the absorbing company (principle of continued membership is broken) ▪ Transferring company dissolved via merger (without liquidation)

STEPS

MARKET SQUEEZE-OUT

- **Offer prospectus:** For tender offers, the publication of an offer prospectus is mandatory under Swiss law. In the offer prospectus, the offeror must disclose its basic intentions with respect to the target company, including, inter alia, a possible squeeze-out as well as delisting.

- **Public takeover bid:** Cancellation procedure under the SESTA requires a successfully launched purchase or exchange offer in accordance with the rules provided under the SESTA and, after which, the offeror holds more than 98% of the voting rights (if the offeror fails to reach this threshold in the offer, he may buy additional shares in the market, taking into account the so-called "Best-Price-Rule" pursuant to Article 10 TOO). A public takeover bid may also be launched in cases where the offeror already holds more than 98% of the shares, for example, with the sole purpose of initiating a subsequent squeeze-out procedure.

- **Cancellation of the outstanding shares:** Within three months after the offer period has lapsed, the offeror has to file a claim against the target company requesting the court to cancel the outstanding shares in the target company. Other shareholders may join this claim; however, they remain independ-

ent of the target company (Article 55 para. 3 SESTO) and may only assert that the prerequisites of the squeeze-out claim are not fulfilled.

- **Re-issuance of the shares; Consideration:** After the judgment comes into force, the public shareholders lose their membership in the target company. The latter has to reissue the shares and allot them to the offeror either against payment of the offer price or fulfillment of the exchange offer in favor of the holders of the shares which have been cancelled.

- **Delisting of the shares:** With the implementation of the cancellation, the shares of the target company are delisted at the board's request (pursuant to the Directive Delisting of the SIX Swiss Exchange).

OFF-MARKET SQUEEZE-OUT

The procedure for the off-market squeeze-out is more complex:

- **Merger Agreement:** The board and management of the merging companies have to enter into a merger agreement which expressly stipulates the squeeze-out. Moreover, the merger agreement has to state the *form of consideration,* as well as its *amount.* Admittedly, the consideration may consist of cash or of other assets, for example, shares in the parent company of the group (a "triangular merger"). The consideration's amount has to be equivalent to the real value of the present shares.

  In order to fully compensate all the company creditors, the prevailing opinion requires the absorbing company to hold a total amount of free disposable assets equal to the consideration to be paid to the squeezed-out shareholders.

- **Merger report:** The board and management of the merging companies have to outline the reasons for the squeeze-out and the consideration to be paid in a separate report. Other than for abusive reasons, no substantial demands are made. Small and medium-sized companies may, if all shareholders agree, dispense with the merger report (Article 14 para. 2 of the Merger Act).

- **Auditors report:** The merger agreement, merger report and balance sheet upon which the merger is based must be audited by a licensed auditor. This auditor has to state in a written report whether the consideration is appropriate. According to the prevailing opinion, this is the case if the consideration is equivalent to the real value of the previous shares at the time the merger agreement is concluded.

- **Inspection rights and adoption of resolution:** Before the shareholders of the merging companies resolve on the merger, they are entitled to inspect the merger agreement, merger's and auditor's report within a period of 30 days. With regard to the resolution, the law requires a qualified quorum: at least 90% of the transferring company's shareholders with voting power must approve the merger (Article 18 para. 5 of the Merger Act). The calculation of this quorum is highly disputed.

- **Appraisal right and challenge right:** Minority shareholders may file a claim for "appropriate" compensation within two months of the publication of the merger resolution in the Swiss Official Gazette of Commerce (Article 105 of the Merger Act).

  In addition, shareholders who have not consented to the merger resolution may, within two months after publication or passing of the merger resolution, file a claim challenging the validity of the merger resolution itself (Article 106 et seq. of the Merger Act).

- **Registration:** The squeeze-out merger is effective with its registration in the register of commerce.

CONCLUSION

The squeeze-out procedures outlined in this brochure form the basis of different transactions.

The market squeeze-out may be introduced by a single person (individual or legal entity) who (is or) has become the owner of more than 98% of the votes in a public company following a public tender offer and who will finally hold 100% of the target company under the same corporate structure.

In contrast, the off-market squeeze-out merger goes hand in hand with the dissolution of the transferring company which is incorporated into another legal entity. The shareholders of both companies have authority to decide on such a merger. The procedure is more complex and more time-consuming and may more easily be challenged by minority shareholders.

Both procedures are available alternatively and additionally. If a public tender offer is not attractive enough and the offeror holds 98% or less (but at least 90%) of the voting rights, it may exclude the minority shareholders via an (additional) off-market squeeze-out.